

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

AXIS REINSURANCE COMPANY,) Case No. 12-2979 SC
)
Plaintiff,) ORDER GRANTING MOTIONS FOR
) DEFAULT JUDGMENT
v.)
)
TELEKENEX, INC.; ANTHONY ZABIT;)
KAREN SALAZAR; BRANDON CHANEY;)
DEANNA CHANEY; MARK PRUDELL; JOY)
PRUDELL; MARK RADFORD; NIKKI)
RADFORD; JOSHUA SUMMERS; JULIA)
SUMMERS; IXC HOLDINGS, INC.;)
STRAITSHOT COMMUNICATIONS, INC.;)
and STRAITSHOT RC, LLC,)
)
Defendants.)
)

I. INTRODUCTION

22 Plaintiff Axis Reinsurance Company ("Axis") now moves for
23 entry of default judgment against Defendants Mark and Nikki
24 Radford, Joshua and Julia Summers, and Mark and Joy Prudell
25 (collectively, "Defendants in default"). ECF No. 128 ("Prudell DJ
26 Mot."), 129 ("Radford DJ Mot."), 130 ("Summers DJ Mot.").¹
27 Defendants in default have not opposed the motions. The Court

28 ¹ At the Court's request, Axis also submitted a supplemental brief on personal jurisdiction. ECF No. 138 ("Supp. Br.").

1 finds the matter appropriate for determination without oral
2 argument per Civil Local Rule 7-1(b), and GRANTS the motions.
3

4 **II. BACKGROUND**

5 **A. Factual Background**

6 This case is an insurance coverage dispute arising out of an
7 underlying action captioned Straitshot Communications, Inc. v.
8 Telekenex, Inc., et al., No. C10-268 TSZ (W.D. Wash) (the
9 "Straitshot action"). ECF No. 15 ("FAC"). In the Straitshot
10 action, Straitshot alleged that Telekenex stole its trade secrets
11 and confidential customer information and covered up this theft
12 through the destruction of evidence. In addition to Telekenex,
13 Straitshot sued Mr. Zabit, Telekenex's president, Mr. Chaney,
14 Telekenex's Chief Executive Officer ("CEO"), and Messrs. Prudell,
15 Radford, and Summers, former Straitshot employees who allegedly
16 funneled business opportunities to Telekenex before resigning from
17 Straitshot. Straitshot also sued the individual defendants'
18 spouses, including Ms. Prudell, Radford, and Summers, on the
19 ground that the other individual defendants' unlawful acts were
20 taken on behalf of the marital community.

21 The Straitshot action ultimately went to trial. The jury
22 returned a \$6.49 million verdict in favor of Straitshot, finding
23 for Straitshot on its claims for: (1) breach of contract against
24 Messrs. Prudell and Radford; (2) breach of the duty of loyalty
25 against Messrs. Prudell and Summers; (3) interference with
26 contractual relations against Telekenex and Messrs. Prudell,
27 Radford, Summers, Zabit, and Chaney; and (4) violation of the
28 Consumer Protection Act against Telekenex and Messrs. Zabit,

1 Chaney, Prudell, and Radford. The jury found against Straitshot on
2 its claims for misappropriation of trade secrets and false
3 statements in violation of the Lanham Act. The Court entered a
4 judgment against all defendants.

5 Following the trial, the court issued additional Findings of
6 Fact and Conclusions of Law awarding Straitshot sanctions for Mr.
7 Summers's spoliation of evidence and failure to produce documents
8 during discovery. Smith Decl. Ex. 10 ("Spoliation FFCL"). In
9 connection with these findings, the Court concluded that Mr.
10 Summers intentionally and wrongfully used a Straitshot laptop and,
11 in bad faith, made substantial alterations and deletions to that
12 laptop in violation of multiple temporary restraining orders. Id.
13 ¶ 24. The Court also found that Straitshot was entitled to
14 sanctions from Telekenex for the spoliation under the doctrine of
15 respondeat superior. Id. ¶ 31.

16 Sometime after the Straightshot action was filed, Telekenex
17 submitted an insurance claim to Axis. The Axis policy provides
18 coverage for claims against directors and officers (a.k.a., "D&O
19 liability"), employment practices liability, fiduciary liability,
20 and outside executive liability, among other things. ECF No. 39
21 Ex. 1 ("Policy") § I. The Policy carves out a number of
22 exclusions, including an "Unlawful Advantage Exclusion" for losses

23
24 based upon, arising out of, directly or indirectly
25 resulting from, in consequence of or in any way
involving: the gaining of any profit, remuneration, or
advantage to which the Insured was not legally
entitled . . . if evidenced by any judgment, final
adjudication, alternate dispute resolution proceeding
or a document or written statement by an Insured.
27

28 Id. § IV.A.5. Axis agreed to accept the duty to defend under the

1 Policy and retained the law firm of Littler Mendelson to defend
2 Telekenex and the individual defendants in the Straithot action.

3 **B. Procedural History**

4 On June 8, 2012, Axis filed the instant action against
5 Telekenex, Straitshot, IXC Holdings, Inc., Mr. Zabit, Ms. Salazar,
6 and Brandon and Deanna Chaney (collectively, the "responding
7 Defendants"), as well as the Defendants in default. Through this
8 action, Telekenex seeks a declaration that the Policy does not
9 cover the damages awarded in the Straithot action or the defense
10 costs incurred in that action. Axis's FAC asserts eight counts,
11 seven of which are relevant here: (I) Declaratory Relief - Unlawful
12 Advantage Exclusion; (II) Declaratory Relief - Insurance Code §
13 533; (III) No Coverage for Spoliation Penalties; (IV) Declaratory
14 Relief - No Coverage for Breach of Duty of Loyalty; (VI)
15 Declaratory Relief - Allocation for Uncovered Amounts; (VII)
16 Equitable Indemnity; and (VIII) Reimbursement. Defendants in
17 default did not respond to the complaint.

18 Later in 2012, Axis moved for partial summary judgment against
19 all defendants. As to the responding Defendants, the motion was
20 granted in part and denied in part. The Court found that the
21 Policy's unlawful advantage exclusion barred coverage for the \$6.49
22 million judgment in the Straithot action, but did not bar coverage
23 for the spoliation sanctions. ECF No. 68 ("SJ Order") at 27. The
24 Court also found that California Insurance Code section 533
25 precluded coverage for damages flowing from Straitshot's claims for
26 interference with contractual relations, but not for damages
27 flowing from the spoliation sanctions. Id.

28 The Court denied the motion with respect to the Defendants in

1 default. Id. at 2 n.1. The Court reasoned that default had
2 already been entered against the Radfords and the Summerses, and
3 the Prudells were served well after Axis moved for summary
4 judgment. Id. The Court stated: "If Axis wishes the Court to
5 enter judgment against the Radfords and the Summerses, then it
6 should move for default judgment. If it wishes for a judgment
7 against the Prudells, then it should provide them with adequate
8 time to respond." Id. About a month after the order was filed,
9 the Clerk entered default against the Prudells. ECF No. 76.

10 Defendants in default have yet to appear in this action. Axis
11 now moves for entry of default judgment against all six of them.
12

13 **III. LEGAL STANDARD**

14 After entry of a default, the Court may enter a default
15 judgment. Fed. R. Civ. P. 55(b)(2). Its decision whether to do
16 so, while discretionary, is guided by several factors. Aldabe v.
17 Aldabe, 616 F.2d 1089, 1092 (9th Cir. 1980). As a preliminary
18 matter, the Court must "assess the adequacy of the service of
19 process on the party against whom default is requested." Bd. of
20 Trs. of the N. Cal. Sheet Metal Workers v. Peters, No. 00-0395,
21 2000 U.S. Dist. LEXIS 19065, at *2 (N.D. Cal. Jan. 2, 2001). The
22 Court should also determine whether the exercise of personal
23 jurisdiction is appropriate. In re Tuli, 172 F.3d 707, 712 (9th
24 Cir. 1999).

25 If the Court determines that service was sufficient and the
26 exercise of personal jurisdiction is proper, it should consider
27 whether the following factors support the entry of default
28 judgment: (1) the possibility of prejudice to the plaintiff; (2)

1 the merits of plaintiff's substantive claim; (3) the sufficiency of
2 the complaint; (4) the sum of money at stake in the action; (5) the
3 possibility of a dispute concerning material facts; (6) whether the
4 default was due to excusable neglect; and (7) the strong policy
5 underlying the Federal Rules of Civil Procedure favoring decisions
6 on the merits. Eitel v. McCool, 782 F.2d 1470, 1471-72 (9th Cir.
7 1986).

8 "The general rule of law is that upon default the factual
9 allegations of the complaint, except those relating to the amount
10 of damages, will be taken as true." Geddes v. United Fin. Grp.,
11 559 F.2d 557, 560 (9th Cir. 1977). "However, necessary facts not
12 contained in the pleadings, and claims which are legally
13 insufficient, are not established by default." Cripps v. Life Ins.
14 Co., 980 F.2d 1261, 1267 (9th Cir. 1992).

15

16 **IV. DISCUSSION**

17 **A. Service of Process**

18 As an initial matter, the Court finds that service of process
19 on Defendants in default was sufficient. The Radfords were served
20 by mail on June 27, 2012, and subsequently returned a waiver of
21 service of summons. ECF Nos. 13, 14. The Summerses also signed
22 and returned written waivers after receiving copies of Axis's
23 original complaint and FAC. ECF Nos. 16, 17. Accordingly, the
24 Radfords and Summerses were properly served pursuant to Federal
25 Rule of Civil Procedure 4(d)(4). Mrs. Prudell was personally
26 served on December 1, 2012. ECF No. 67. Mr. Prudell was properly
27 served on December 3, 2012, by leaving a copy of the summons and
28 complaint at his usual dwelling with his wife. ECF No. 66, Fed R.

1 Civ. P. 4(e)(2)(B).

2 **B. Personal Jurisdiction**

3 "When a court is considering whether to enter a default
4 judgment, it may dismiss an action sua sponte for lack of personal
5 jurisdiction." Tuli, 172 F.3d at 712. As this Court sits in
6 California and all six Defendants in default reside in Washington,
7 FAC ¶¶ 6-8, the Court requested supplemental briefing on the issue
8 of personal jurisdiction. Having reviewed Axis's briefing, the
9 Court is satisfied that the exercise of personal jurisdiction is
10 proper.

11 The Radfords and Prudells have expressly consented to the
12 Court's exercise of personal jurisdiction. These four defendants
13 entered into a settlement agreement with Axis whereby they agreed
14 "that the Court . . . has power to enter default judgment against
15 them on Axis's [FAC] therein, and submit to th[e] Court exercising
16 personal jurisdiction over them accordingly." ECF No. 138-1
17 ("Smith Decl.") Ex. A § 3, Ex. B § 3. "Because the personal
18 jurisdiction requirement is a waivable right, there are a variety
19 of legal arrangements by which a litigant may give express or
20 implied consent to the personal jurisdiction of the court." Burger
21 King Corp. v. Rudzewicz, 471 U.S. 462, 473 n.14 (1985). The Court
22 finds the Radfords and Prudells have waived the personal
23 jurisdiction requirement through their agreements with Axis.

24 The Court also finds that the exercise of personal
25 jurisdiction over Mr. Summers is appropriate because he purposely
26 availed himself of the privilege of conducting activities in
27 California, and this suit arises out Mr. Summers's contacts with
28 California. Id. at 475. As an employee of Telekenex, a San

1 Francisco-based company, Mr. Summers frequently worked in
2 California. Mr. Summers's trial testimony indicates that, though
3 he lived in Washington, he often stayed in San Francisco during the
4 work week, and that his company laptop generally stayed in
5 California. Smith Decl. Ex. C. Moreover, the underlying
6 Straithot action, as well as the instant insurance coverage
7 dispute, arose, at least in part, out of Mr. Summers's employment
8 with Telekenex in California, and his attempts to siphon business
9 to Telekenex. Finally, Mr. Summers has yet to present a compelling
10 case that the exercise of jurisdiction would be unreasonable.

11 This leaves Mrs. Summers, another resident of Washington.
12 Axis argues that Mr. Summers' forum contacts are attributable to
13 Mrs. Summers as a matter of agency and marital community law.
14 Dated Washington law tends to support this assertion. See Barer v.
15 Goldberg, 20 Wash. App. 472, 481 (Wash. Ct. App. 1978) (holding
16 "that the transaction by the husband as manager of the community,
17 is all that is necessary to subject the wife to jurisdiction,
18 particularly where she had knowledge of the transaction."). In any
19 event, Mrs. Summers has yet to contest the Court's exercise of
20 personal jurisdiction.

21 For these reasons, the Court finds that the exercise of
22 personal jurisdiction is proper.

23 **C. Eitel Factors**

24 Since service of process and the exercise of personal
25 jurisdiction are proper, the Court next turns to the Eitel factors
26 to determine whether default judgment is appropriate. The Court
27 finds that the Eitel factors favor default judgment here.

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1 **i. Possibility of Prejudice**

2 The first factor considers the possibility of prejudice
3 against the plaintiff if default judgment is not entered. The
4 Court finds that because Axis may be without recourse for recovery
5 if default judgment is not entered, this factor weighs in favor
6 of default judgment. See PepsiCo, Inc. v. Cal. Sec. Cans, 238 F.
7 Supp. 2d 1172, 1177 (C.D. Cal. 2002).

8 **ii. The Merits of Axis's Claims**

9 The second and third Eitel factors require that a plaintiff's
10 allegations state a claim upon which it can recover. With respect
11 to Count I and II, the Court has already held that Policy's
12 unlawful advantage exclusion and California Insurance Code section
13 533 bar coverage for the \$6.49 million judgment in the Straithot
14 action. SJ Order at 13-14, 24.

15 As to Count III, the Court previously held that the section
16 533 did not preclude coverage as to Telekenex for spoliation
17 sanctions. The Court reasoned that the statute does not bar
18 indemnification for a principal where it is held vicariously liable
19 for the willful acts of its agents, and the court in the Straithot
20 action only held Telekenex liable for spoliation sanctions on the
21 basis of vicarious liability. Id. at 22-24. Axis now asserts a
22 new argument on the spoliation sanctions, contending that fines or
23 penalties do not constitute a covered "loss" as defined by the
24 Policy. The Court finds this argument sufficient for the purposes
25 of a motion for default judgment.

26 As to Count IV, the Court finds plausible Axis's allegation
27 that it is not liable for any damages awarded in connection with
28 the defaulting Defendant's breaches of their duty of loyalty. In

1 the Straitshot action, Messrs. Prudell and Summers were held liable
2 for breaches of their duty of loyalty to Straitshot. Their wives
3 were also found liable because the actions were taken to benefit
4 the marital community. However, the Policy only provides coverage
5 for Telekenex employees when they are acting within the scope of
6 their employment. Thus, any actions Messrs. Prudell and Summers
7 took or failed to take on behalf of Straitshot are not covered by
8 the Policy.

9 Axis also moves for default judgment on Count VI as to all of
10 the defaulting Defendants. Axis could be clearer about exactly
11 what relief it is seeking with respect to this count, but the
12 pleadings suggest that Axis seeks a declaration that any amounts
13 Axis advanced in connection with the defense of the Straitshot
14 action are not covered by the Policy. See FAC ¶¶ 72-73. In light
15 of the findings above, the Court finds the pleadings plausible in
16 this respect.

17 Finally, Axis moves for summary judgment as to the Summerses
18 on Counts VII and VIII, which essentially seek reimbursement for
19 any defense costs advanced on the Summerses behalf. Since
20 Straitshot's claims were not covered by the Policy, the Court finds
21 reimbursement appropriate.

22 In sum, the Court finds that the second and third Eitel
23 factors favor default judgment.

24 **iii. The Amount of Money**

25 As to the fourth Eitel factor, the Court must consider "the
26 amount of money at stake in relation to the seriousness of
27 defendant's conduct." N. Cal. Sheet Metal Workers, 2000 U.S. Dist.
28 LEXIS 19065, at *4-5. "The Court considers Plaintiff's

1 declarations, calculations, and other documentation of damages in
2 determining if the amount at stake is reasonable." Truong Giang
3 Corp. v. Twinstar Tea Corp., No. 06-CV-03594, 2007 WL 1545173, at
4 *12 (N.D. Cal. May 29, 2007). Axis does not seek monetary relief
5 from the Prudells and the Radfords, and seeks only \$39,471.11
6 against the Summerses. This factor weighs in favor of the entry of
7 default judgment.

8 **iv. The Remaining Eitel Factors**

9 The Court finds that the remaining Eitel factors also favor
10 entry of default judgment. The material facts of this case are not
11 reasonably likely to be subject to dispute, and there is no support
12 for finding that the defendants' default is due to excusable
13 neglect. All six of the defaulting Defendants were served over a
14 year ago, and all of them have yet to enter an appearance.
15 Moreover, while "[c]ases should be decided upon their merits
16 whenever reasonably possible," Eitel, 782 F.3d at 1472,
17 "Defendant's failure to answer Plaintiff['s] Complaint makes a
18 decision on the merits impractical if not impossible, PepsiCo, 238
19 F. Supp. 2d at 1177.

20 **D. Damages**

21 A plaintiff moving for entry of default judgment must prove up
22 its requested damages. Philip Morris USA, Inc. v. Castworld
23 Products, Inc., 219 F.R.D. 494, 501 (C.D. Cal. 2003). Here, Axis
24 has submitted a declaration from one of its assistant vice
25 presidents in support of its requested damage award against the
26 Summerses. The declaration states that Axis paid the Summerses'
27 attorney \$39,471.11 in connection with the Straitshot action. The
28 Court finds the declaration sufficient for the purposes of default

1 judgment.

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3 **V. CONCLUSION**

4 For the reasons set forth above, Plaintiff Axis Reinsurance
5 Company's motion for default judgment is GRANTED. The Court shall
6 enter judgment separately.

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8 IT IS SO ORDERED.

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10 Dated: February 19, 2014


11 UNITED STATES DISTRICT JUDGE

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